MOBIL OIL CORP.

IBLA 82-929 Decided December 20, 1983

Appeal from decision by Deputy Assistant Secretary -- Indian Affairs (Operations) establishing payment of mineral royalty rate. IND-31-MIN.

Affirmed.

1. Rules of Practice: Generally -- Rules of Practice: Appeals: Statement of Reasons -- Rules of Practice: Appeals: Timely Filing

   The waiver by an appellant of a specified issue concerning current royalty payments during an appeal before the Geological Survey under procedural rules governing such appeals will be enforced upon appeal to the Board of Land Appeals.

2. Indian Lands: Mining Leases: Royalties

   Adjustment of royalty is not required where there is no lease provision or applicable regulation either permitting or requiring an adjustment.

APPEARANCES: Robert W. Haines, Esq., Denver, Colorado, for appellant.

OPINION BY ADMINISTRATIVE JUDGE ARNESS

Mobil Oil Corporation (Mobil) appeals the March 19, 1982, decision of the Deputy Assistant Secretary -- Indian Affairs (Operations), Bureau of Indian Affairs (Deputy Assistant Secretary), setting the royalty rate payable by Mobil to the Indian lessor of lands leased by Mobil for uranium mining. The leased property, located in McKinley County, New Mexico, is the site of a pilot plant which employs a solution mining method to extract uranium from its lode. The extraction process used is experimental. Some production began, however, in 1979 and the plant has produced more than 14,000 pounds of uranium concentrate, none of which has been sold. The uranium concentrate is stored at the minesite. Mobil anticipates the entire production of the plant will be sold at a single sale.

Under the terms of the mining lease between the parties, royalties are payable monthly once production commences. The applicable royalty provision, paragraph 1(d), exhibit A to the lease, recites:

> Lessee agrees to pay the Lessor a royalty of ten (10) percent of the value of uranium recovered from mine waters (whether natural or introduced), from leaching ores in place on the leased lands or by leaching such materials after they have been mined or extracted from the leased lands, or by leaching the waste material resulting from the treatment of ores from the leased lands. The value of uranium, as used herein, shall be the weighted average price per pound for U[3]O[8] in uranium concentrate received by the Lessee, or the seller of Lessee's concentrate, at the processing plant producing such concentrate, during the month for which royalty is being computed, except that if no sales have been made during the month for which royalty is being computed, then the value of uranium shall be the weighted average price per pound of U[3]O[8] received by the Lessee or the seller of Lessee's concentrate during the preceding six (6) months.

Until April 1980 Mobil made payments of monthly royalty based upon prices received from uranium concentrates sold by Mobil at other uranium leases operated in south Texas. This method of calculating royalty payments was the result of an informal determination made by Geological Survey (Survey) in December 1979 that, in the absence of any sales from the New Mexico facility, the sales by Mobil's Texas operations could be used to compute royalty. On April 2, 1980, Mobil proposed to Survey that (1) royalty payments already made should be adjusted to reflect actual production volumes and sales prices of the New Mexico uranium concentrate in the New Mexico market when sale occurs, and (2) until ultimate sale occurs, the royalty rate should be adjusted to reflect actual New Mexico market price in the vicinity of the mine, market price to be determined by the use of an industry report (NUEXCO) of market variations for uranium. 1/ Survey, in a decision dated April 18, 1980, rejected Mobil's proposal. Quoting paragraph 1(d), supra, the April 18 decision apparently construed the lease language to mean that other sales from other uranium leases also held by Mobil must be taken as the basis for

1/ In its brief on appeal, appellant proposes the use of a report called "Nuexco," which it describes as follows:

"Nuexco is one of the few concerns which publishes a report on the uranium market on a monthly basis. It reports an Exchange Value and a Transaction Value for uranium concentrate. The Exchange Value is based on several factors including prices a willing seller would pay and a willing buyer would accept. As such, it does not consider prices for uranium concentrate delivered under old or renegotiated contracts. Transaction Value is a weighed price of recent transactions closed within the previous three month period for which delivery is scheduled one year from the transaction date. As such, the Exchange Value is a fairly accurate barometer of the prices which would be paid for new sales of uranium concentrate in the industry. The Nuexco Exchange Value is a value routinely used by the industry in agreements as an indicator of the fair market value of uranium concentrate" (Appellant's Brief at 4-5).

calculation of royalty in the absence of sales from the New Mexico property, and concluded:

> We must, therefore, deny your request to base the sales price on the NUEXCO spot market price. You must continue to use the weighted average price per pound of U[3]O[8] that you have received for the concentrates from your other projects during the preceding six months. The lease agreement does not provide for adjusting the royalty paid to reflect the actual sales price; therefore, your request to adjust the previous royalty payments, when that concentrate is sold, is also denied.

It was this decision which was appealed to the Deputy Assistant Secretary. In its cover letter which accompanied its notice of appeal filed on May 21, 1980, Mobil stated: "You will note that Mobil is appealing only that portion of your decision which denies the right to retroactively adjust the royalty when actual sales commence." This statement was reiterated in the notice of appeal. The statement of reasons, which also accompanied the notice of appeal as required by 30 CFR 290.3, while it discussed the NUEXCO price, did so in the context of showing the necessity of eventually offsetting the royalty paid from the amount which was ultimately determined to be due. Before the Deputy Assistant Secretary, therefore, Mobil waived its first contention concerning current payments.

On March 19, 1982, the Deputy Assistant Secretary affirmed the Survey decision holding that since "the lease does not provide for the royalty adjustment requested by Mobil," the adjustment sought could not be made. Rejecting the contention by Mobil that provision of 30 CFR 231.61 permits the adjustment of royalty sought under the circumstances of this appeal, the Deputy Assistant Secretary did not discuss the issue of current payments in relation to NUEXCO price.

On appeal to this Board, Mobil urges that both Survey and the Deputy Assistant Secretary erred by failing to properly construe the terms of the lease agreement. Mobil now contends that the issues on appeal are:

> 1. Whether the Acting Deputy Conservation Manager (Conservation Manager) erred in interpreting Exhibit "A" of the Lease, which states that royalties are to be paid on the value of uranium concentrate sold, to require Mobil to use as the value sales from its South Texas operations when there were no sales of uranium concentrate from the Lease and in not allowing Mobil to adjust the royalties to reflect actual volumes and sales.
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> 2. Whether the Deputy Assistant Secretary - Indian Affairs (Operations) (Deputy Assistant Secretary) erred in not finding that the proper value of uranium concentrate on which to base royalties from the Lease was the market price of uranium concentrate in the same general area as the Lease, rather than the value of sales by Mobil in South Texas.
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> 3. Whether the Deputy Assistant Secretary erred in not finding that the Lease allowed Mobil to adjust the royalties paid

on estimated values to reflect actual volumes and sales from the Lease.

4. Whether the Deputy Assistant Secretary erred in holding that he was prevented from reversing the Conservation Manager's decision disallowing an adjustment to the value of uranium concentrate by Mobil to reflect actual volumes and sales from the Lease by 30 CFR § 231.61(a) (1980).

(Appellant's Brief at 2, 3).

[1] Despite Mobil's attempt to revive previous arguments concerning current sales values, it is clear that this issue and arguments relating to it were waived during appeal to the Deputy Assistant Secretary under the regulations in 30 CFR 290 governing appeals. Prior Departmental decisions have traditionally enforced those procedural regulations even where they are stricter than those followed by this Board. See Mesa Petroleum Co., 44 IBLA 165 (1979); Robert B. Ferguson, 23 IBLA 29 (1975). Under the circumstances of this appeal, the decision by Mobil to waive its contention concerning current sales prices before the Deputy Assistant Secretary precludes further review now before this Board, since the contention is consequently made out-of-time and is now barred. See 30 CFR 290.3.

[2] The question whether there should be an adjustment of royalties following sale of the uranium produced from the lease is, however, properly before the Board and must be addressed. Appellant places great reliance on the proviso to 30 CFR 231.61(a)(1) (1982) which provides: "That in a situation where an estimated value is used, the Mining Supervisor shall require the payment of such additional royalties, or allow such credits or refunds as may be necessary to adjust royalty payment to reflect the actual gross value." The Deputy Assistant Secretary, however, in his decision of March 19, 1982, found that Mobil was not making estimated payments of royalty. Under existing Departmental regulations, recourse to "estimated value" can only be made in two circumstances: (1) the sales agreement between the lessee and purchaser is not a bona fide transaction; or (2) the material produced by the lessee is consumed by the lessee so that there is no sale. See 30 CFR 231.61 (1982). Appellant does not contend that either situation applies to this case. Mobil has elected voluntarily to postpone sales without giving any reason for its decision to do so. Clearly, the lease between the parties contemplated sales, and made sales the basis for computation of royalty (see Exh. A to lease dated Apr. 3, 1972). The Departmental regulation similarly contemplates such sales. While valuation of production by Survey may, in this case, be characterized as an "estimated value" in a conceptual sense, this value is derived by resort to paragraph VII of the lease agreement, and not by application of the provisions of 30 CFR 231.61 (1982). Paragraph VII of the lease provides in pertinent part:

The Lessee agrees that the Secretary of the Interior, for the purpose of determining the royalties due hereunder, may establish reasonable minimum values for the minerals mined, due consideration being given to the highest price paid to producers for minerals of like quality produced from the same general area, the price received by the Lessee, posted prices and other relevant matters.

The provisions of 30 CFR 231.61 (1982) are, moreover, not applicable to this lease. Paragraph XVII of the lease, which was executed in 1972, obligates the lessee:

> To abide by and conform to the terms of this lease and all regulations of the Secretary of the Interior now or hereafter in force and relative to such leases including 25 CFR 172 and 177, and 30 CFR 231, except as qualified herein. Rate of royalty, the annual rental or the term of the lease may not be changed by a future regulation without the written consent of the parties of this lease.

The adjustment of royalty provision appearing at paragraph VII, quoted supra, appears to be intended to be part of the rate of royalty provided by the lease. Since these rates are not subject, under paragraph XVII, supra, to future regulation, the 1972 regulations must be examined to determine whether there are applicable rules governing royalty rates outside the lease.

In 1972, 30 CFR 231.61 (then 231.27) read:

> The sale price basis for the determination of the rates and amount of royalty shall not be less than the highest and best obtainable market price of the ore and mineral products, at the usual and customary place of disposing of them at the time of sale, and the right is reserved to the Secretary or the Interior to determine and declare such market price, if it is deemed necessary by him to do so for the production of the interests of the lessor.

The decision of the Deputy Assistant Secretary to approve the action taken by Survey was correct and in conformity to the provisions of the regulations applicable in 1972, as well as the lease agreement between the parties. The provisions of 30 CFR 231.61 (1982) are not, contrary to appellant's assertion, relevant to this situation and could not properly have been applied. The regulation in effect in 1972 simply made no provision for adjustment such as appellant seeks, and, in fact, reserved to the Secretary the right to determine price in the event it became necessary to do so to protect the Indian lessor.

Pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed.

Franklin D. Arness
Administrative Judge
Alternate Member

We concur:

James L. Burski
Administrative Judge

Bruce R. Harris
Administrative Judge